In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-501

TERMINAL FREIGHT COOPERATIVE ASSOCIATION and TERMINAL FREIGHT HANDLING COMPANY, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. We respectfully invite the Court's attention to the following facts, which show that the petition was filed out of time. The judgment of the court of appeals was entered on May 9, 1972 (Pet. 2), and a petition for rehearing *en banc* was denied on June 7, 1972 (Pet. App. 26). The 90-day period for filing a petition for a writ of certiorari prescribed by 28 U.S.C. 2101(c) expired on September 5, 1972, and no extension of time was obtained. The petition was

filed on September 26, 1972. Regardless of the reasons given for the failure to file the petition within the period provided by 28 U.S.C. 2101(c), the time limitation there prescribed is jurisdictional.[1]

2. In any event, there is no reason to grant the writ.[2] The court of appeals held that the General Counsel's "unreviewable discretion to refuse to institute an unfair labor practice complaint" (*Vaca* v. *Sipes*, 386 U.S. 171, 182)[3] includes the power to

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[1] Petitioners initially moved for an extension of time on September 5, 1972, the last day for filing the petition. Petitioners' counsel states that sometime "later that day" he was erroneously advised by "an unidentified female employee" in the Clerk's Office that the untimely motion had been granted, and that it was not until September 7, 1972, that he learned that the information was incorrect (Motion To File Petition, pp. 3-4). Petitioners' principal counsel, who is located in Chicago, Illinois, states that a "typewritten proof" of the brief would have been filed on September 5, 1972, had he been told that the request had been denied. On September 7, 1972, petitioners resubmitted its motion for an extension of time, relating the facts described above. On September 12, 1972, Mr. Justice Brennan denied the motion. The petition was not filed until September 26, 1972.

[2] This Court has denied review of petitioners' earlier efforts to obtain review of action taken by the General Counsel of the Board in connection with the settlement of unfair labor practice charges filed by them. *Sears, Roebuck & Co.* v. *Solien*, No. 1588, 1970 Term, certiorari denied, 403 U.S. 905; *Terminal Freight Handling Co.* v. *Solien*, No. 71-609, 1971 Term, certiorari denied, 405 U.S. 996; *Sears, Roebuck & Co.* v. *Solien*, No. 71-924, 1971 Term, certiorari denied, 405 U.S. 996; *Terminal Freight Cooperative Ass'n* v. *Solien*, No. 71-925, 1971 Term, certiorari denied, 405 U.S. 996.

[3] Section 3(d) of the National Labor Relations Act (Pet. 3) gives the General Counsel of the Board "final authority, on

enter into a *pre-complaint* informal settlement with the charged party, and that therefore it lacked jurisdiction to compel the General Counsel to accord the charging party an evidentiary hearing on its objection to the settlement. For the reasons set forth in the opinion of the court of appeals (Pet. App. 22-25), that holding is correct.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

ERWIN N. GRISWOLD,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

NOVEMBER 1972.

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behalf of the Board, in respect of the investigation of charges and the issuance of complaints * * *, and in respect of the prosecution of such complaints before the Board * * *."

[4] There is no conflict among the courts of appeals. *Frito Company, Western Division* v. *National Labor Relations Board*, 330 F. 2d 458 (C.A. 9) (Pet. 9, 10-11, 15), is inapposite. That case holds only that, where the General Counsel has permitted the charging party to introduce evidence which goes beyond the issues framed by the complaint, the Board does not impinge upon the General Counsel's prosecutory authority in permitting, over the objection of the General Counsel, "an amendment of the complaint to conform to proof admitted without objection" (330 F. 2d at 465).

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